IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1161

A. L. GARNER, ET AL., *Petitioners*,

v.

FIRST AMERICAN LIFE INSURANCE COMPANY,
Respondent.

BRIEF OPPOSING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RELEVANT STATUTES AND RULES

Title 10, §21(46), Code of Alabama (1940) is reproduced *infra* at p. A-1.

STATEMENT OF THE CASE

Petitioners' statement is supplemented as follows:

Petitioners seek by discovery processes to reach confidential communications between the respondent Corporation and its attorney relevant to the matter in issue. Petitioners are undertaking to prove a conspiracy to violate laws prior to and in the acts of selling stock to them. Their suit seeks to impose liability

on the Corporation because of illegal acts claimed to have been committed before they were stockholders or had any rights as such. Petitioners seek to require their corporate adversary to open to them its confidential files of what had gone on before.

The documents and disclosures sought are not within the records open to them by state statute (Code of Alabama (1960), Title 10, § 21(66)). Their purpose is not recognized as a proper one under the common law (6 Fletcher, *Cyclopedia of the Law of Private Corporations*, 1967 Revised Vol., § 2218, p. 789).

The District Court held that there is no attorney-client privilege available to a corporation in a suit by stockholders. The rationale of the two English authorities relied on by the District Court (*Gouraud* v. *Edison Gower Bell Telephone Company of Europe, Limited*, 57 L. T. Ch. 498, 30 L. T. 813 (1888), and *W. Dennis & Sons, Ltd.* v. *West Norfolk Farmers Manure & Chemical Company, Ltd.*, 3 A.11 E. R. 94, 112 L. J. Ch. 239, 169 L. T. 74, 59 TLR 298, 89 Sol. Jo. 211 (1943)), is a simple one. The stockholders' money paid for the opinion of the attorney and the opinion of the attorney is therefore available to the stockholders.

ARGUMENT OPPOSING CERTIORARI

The District Court's application of so radical a rule would effectively destroy the attorney-client relationship as it exists in today's business world. In the case of widely held public corporations, access as a matter of right by every stockholder to communications with attorneys is equivalent to public access. The ruling of the Court of Appeals merely tempered the unjustified abrogation of the attorney-client privilege.

More than adequate recourse is reserved to the stockholders if justification be shown.

The Circuit Courts in some measure thereby restored operation of a privilege which has been universally recognized as public policy in this nation. Illustrative of such recognition is the statement concerning letters from an attorney to his client made by the Supreme Court of Alabama in *Gaines* v. *Fear*, 163 Ala. 358, 50 So. 1000, as follows:

> "Such matters are among, if they are not, the most privileged; and the cases are very rare, if any there be, where these secrets should be revealed by compulsion as was done in this case."

There is no conflict among Circuits. The contrary rulings from other District Courts all "dominoed" from the ruling in this case as a result of significant efforts by counsel for petitioners. The question was an important one only so long as the District Court's order remained uncorrected. Prior to the District Court ruling the Seventh Circuit's statement in *Radiant Burners, Inc.* v. *American Gas Association*, 320 F. 2d 314, cert. denied 375 U.S. 929 (1963), could have been applied accurately to the precise question here:

> "it is obvious to us that no litigant has heretofore thought that there was merit enough in the proposal to warrant a challenge to the availability of the privilege to a corporation."

The Circuit Court's ruling in nowise contravenes any changed rules. The conflict posed by petitioners is specious. The liberalized discovery effected by amendments to Rule 34 and 26 of the Federal Rules of Civil Procedure is explicitly applicable to matters "not privileged". The limitation of a privilege is an entirely different thing.

It is equally clear that the Circuit Court's solution does not place so "staggering" a burden on the district courts as petitioners would suggest. District Judges have long experience in dealing with determination of "good cause". The body of case law springing from *Hickman* v. *Taylor*, 329 U.S. 495, is not wholly satisfactory, but it illustrates some exposure by judges to comparable problems. The judge's determination as required by the Fifth Circuit's opinion should be a great deal less difficult than those required in *Hickman* situations. In the first place, it is limited to stockholder suits which are comparatively rare. Secondly, the "good cause" ("necessity" or "justification" is a more descriptive characterization) for disallowing a claim of privilege should be notably more clear cut than "good cause" for disallowing a nonprivileged, qualified immunity from discovery. In any event it is a clearly manageable part of the judge's responsibility in supervising pretrial discovery.

CONCLUSION

If the Fifth Circuit erred it did so by infringing on the inviolate character of the attorney-client privilege. Certiorari should be denied.

Respectfully submitted

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APPENDIX

1940 Code of Alabama, Recom. 1952. Title 10.

§ 21 (46). Books and records of corporation.—Each corporation shall keep correct and complete books and records of account and shall keep written minutes of the proceedings of its stockholders and board of directors; and shall keep at its principal office, or at the office of its transfer agent or register, a record of its stockholders, giving the names and addresses of all stockholders and the number and class of the shares held by each.

Any person who shall have been a stockholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes, and record of stockholders and to make extracts therefrom.

Any officer or agent who, or a corporation which, without reasonable cause, shall refuse to allow any such stockholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of stockholders, for any proper purpose, shall be liable to such stockholder in a penalty of ten per cent of the value of the shares owned by such stockholder, in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of stockholders for any such purpose, or has improperly used any information secured through any prior examination

of the books and records of account, or minutes, or record of stockholders of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a stockholder of proper purpose, irrespective of the period of time during which such stockholder shall have been a stockholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such stockholder of the books and records of account, minutes, and record of stockholders of a corporation.

Upon the written request of any stockholder of a corporation, the corporation shall mail to such stockholder its most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations. (1959, p. 1073, § 46, appvd. Nov. 13, 1959.)